IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 434 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE K.J. VAIDYA
and
MR.JUSTICE D.G. KARIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements ? YES

2. To be referred to the Reporter or not ? YES

3. Whether Their Lordships wish to see the fair copy of the judgement ? NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder ? NO

5. Whether it is to be circulated to the Civil Judge ? NO

STATE OF GUJARAT

Versus

BABU RAVA KOLI

Appearance:
MR UA TRIVEDI, APP for the appellant-State.
MR CH VORA for Respondent No. 1

CORAM : MR.JUSTICE K.J.VAIDYA and
MR.JUSTICE D.G.KARIA
Date of decision: 06/02/97

ORAL JUDGMENT (PER : VAIDYA J)

This appeal by the State of Gujarat is directed against the impugned judgment and order dated 11-2-1995,

rendered in Sessions Case No., 68/84 by the learned Additional Sessions Judge, Kutch at Bhuj, wherein Babu Rava Koli, who came to be tried for the alleged offences punishable under sections 302 and 504 of IPC, was at the end of the trial, came to be acquitted.

2. To briefly narrate the prosecution case, the incident in question where Mongibai Manji and her son Harji Kesha were swarded to death by Babu Rava Koli took place on 13-5-1984 at 12-00 Noon in the market of Rapar This incident was eye-witnessed by three witnesses viz. (1) PW-4 Moti Bhura; (2) PW-5 Premji Valji; and (3) PW-7 Vaghji Karsan, who had incidentally their shops nearby the scene of the incident. It further appears that somebody (not examined) from Ravechi Transport Co. Rapar, informed the police about the alleged incident which was entered as "JANVA JOG ENTRY " at 12-00 Noon, which is brought on the record at Exh. 35. On the basis of this information, PW-13 PSI P.S. Zala alongwith his police personnel went to the scene of the offence, where he found one woman and one man lying in the injured condition. They were ultimately taken in a Government vehicle to Primary Health Centre, Rapar, and there on inquiring from PW-12 Dr. K.D. Makwana, whether the injured Mongibai was conscious and in a position to reply, and on Doctor nodding that she was, he recorded the FIR of Mongiban at Ex.30 . This FIR is indisputably taken down by PW-13 PSI Zala. Finding that Mongibai was conscious and in a fit state of mind to give her statement, he also tried to contact the Executive Magistrate, to record dying ddeclaration, however, since he was not available, PSI Zala himself recorded the statement in question and answer form which is produced at Ex.31, as a dying declaration Thereafter, the injured Mongibai and her son Harji were immediately taken to G.K.Hospital at Bhuj, which we are informed at the Bar is about 100 Kms. away from Rapar. While on way to Bhuj, the vehicle was stopped at Chitrod, where PW-8 Kheta -husband of Mongibai was called to accompany the injured to Bhuj Hospital. It is further the case of the prosecution that on the way, PW-8 Kheta inquired from Mongibai as to who were the assailants, to which she replied that Babu . It further appears that on the very day at 7-00 PM, Mongiben breathed her last and her son-Harji died after four days. During the course of the further investigation, PSI Zala arrested Babu Rava Koli, who also discovered the blood-stained sword from the house of PW-6 Bhura Ruda(Hastia) who happens to be his father-in-law . On the basis of this investigation, the respondent ultimately came to be chargesheeted for the aforesaid offences to stand trial before the Sessions

Court, Kutch at Bhuj, wherein he ultimately came to be acquitted, giving rise to the present appeal by the State as stated above in para-1 of this judgment.

3. Heard Mr. U.A.Trivedi, the learned APP and Mr. C.H.Vora, the learned advocate appearing for the respondent-accused.

4. Before we enter into the appreciation of the evidence, we are indeed quite conscious of the fact that the appeal we are dealing with is an acquittal appeal, wherein as held by the Supreme Court in its judgment rendered in case of RAMESH BABULAL DOSHI VS. STATE OF GUJARAT, reported in (1996)2, GLH, 206, the appellate court is required to seek an answer to three questions before reversing the order of acquittal viz.whether the findings of the trial court are (1) palpably wrong; (2) manifestly erroneous; or (3) demonstrably unsustainable, and accordingly, if we come to the conclusion that in view of the infirmities, acquittal can not be sustained, then and then only we would be justified in recording the order of conviction and sentence against the accused. In other words, as held by several decisions of the Supreme Court, even if on the same set of facts and circumstances, this court sitting as a trial court was to reach the different and ultimate conclusion of conviction, then even , that by itself was not sufficient to disturb the order of acquittal, unless and until the same was found to be perverse. As a matter of fact, these are the different ways of expression of the Supreme Court, ultimately, the direction and the mandate is the same except expressed in different words and mode of expression.

5. Now looking at the record of the case, initially the prosecution case was based on three sets of circumstances - viz (1) Three eye witnesses viz. PW-4, PW-5 and PW-7; (2) Three Dying Declaration of Mongibai out of which two stand duly reduced in writing viz (i) FIR-EX.30; and (ii) EX-31 recorded in question and answer form .Both by PW-13 PSI Zala; and third one oral viz (iii) that statement by Bai Mongi before her husband (PW-8) Kesha Khetia ; and (3) the circumstantial evidence consisting of the recovery of sword and the blood-stained clothes , of the accused.

6. Now it appears that all the three witnesses viz. PW-4, 5 and 7 who were having their respective shops nearby the scene of offence and initially claimed having eye-witnessed the incident, have for whatever reasons,

ultimately not supported the prosecution to the extent only of identifying the accused. As regards the rest of the happening of the above incident, all of them have said that the incident in question had taken place in the market nearby their shops where some one caused injuries to one woman and one male. In this view of the matter, three eye witnesses having not supported the prosecution, there evidence automatically stands discarded from being considered, except to the broad extent corroborating the prosecution story that on the date and time of the alleged incident nereby their shops , two persons came to be fatally injured by some one.

7. That takes us now to appreciate the second set of evidence viz. oral dying declaration made by Mongibai before her husband - Kesha Kheta (PW-8), and two written dying declarations viz. FIR (Ex-30) and the dying declaration in question and answer form (EX-31) recorded by the PSI Zala himself. At this stage, at the very outset only it is required to be stated that from these two sets of dying declarations, it can be said with certainty that the finding of the learned trial Judge are palpably wrong and manifestly erroneous making the acquittal order demonstrably unsustainable. Accordingly, we would first like to advert to the FIR EX-13 and thereafter the dying declaration at EX- 31 and find out whether it is worth inspiring our confidence and that too for recording the order of conviction and sentence under section 302 of IPC in an acquittal appeal.

(7.1) FIR (EX-30) was given by deceased Mongibai herself to PW-13 PSI Zala, wherein she has stated that she was wife of Manji Kheta and residing at Dedarva. It is further stated therein that today i.e. on 13-5-1984 at about 11-45 hrs. from Chitrod Railway Station, boarding in Bhuj to Rapar bus, she and her son-Harji had come to Rapar to purchase the household goods and were sitting nearby the shop of PW-4 Valand Bhura. In the meantime, Koli Babu Rava of village Sai came with a sward and injured her and her son giving the filthy abuses against mother and sister. First. he gave a sword blow on the left side of buttock of her son-Harji, as a result he screaming set down. While trying to rescue him, Babu Rava gave her a blow with the sword on the front portion of her elbow and the second blow on her left side. On being injured, she raised alarm, as a result of which many people from the vicinity of the scene of offence got collected. Thereafter, Babu Rava made good his escape taking a sword with him. In the meantime, PW-13 PSI Zala coming to the scene of the offence, she and her son were taken to the Primary Health Centre at Rapar. She has

also stated that her son was unconscious, however, she was conscious and this incident had taken place because of the old rivalry between the parties. This FIR (EX-30) bears the right-hand thumb impression of Mongibai and also that of PW-13 PSI Zala.

(7.2) Thereafter, according to PW-13 PSI Zala, he tried to requisition the services of the Executive Magistrate to record the dying declaration of Mongibai , but since he was not available, he himself recorded the same. This dying declaration (EX-31) reads as under :

My name. : Monghibai, wife of Manji Kheta.
By caste - Parkara Koli.
Aged-40 ; Occu-Labour work, residing at Dedarva, Taluka - Rapar.

Question : Who caused injuries to you and your son ?

Answer : Koli Babu Rava Usetiya of village Sai caused injuries to me and my son Harji.

Question : Where were you when you received injuries ?

Answer : We were sitting on the 'Otla' near the shop o Valand Bhura of Dabuda-Rapar.

Question : By which weapon, these injuries were caused to you and your son ?
Answer : By sword.

Question : What was the cause for the quarrel ?

Answer : Old enmity.

This dying declaration (EX-31) indisputably bears the right hand thumb impression of Mongibai and is duly signed before PW-13 PSI Zala and in the presence of PW-12 - the Medical Officer of Rapar, Dr. D.N.Makwana,(signature illegible) bearing the date 13-5-1984 and time at 12-45 Noon.

8. Now, vehemently challenging the credibility of the above dying declarations,(EX-31), Mr.Vora, the learned advocate for the respondent-accused submitted that the learned trial Judge has given quite thumping, cogent and convincing reasons while discarding the same,

holding that the same does inspire confidence. According to Mr. Vora (1) the very fact that the dying declaration EX-31 came to be recorded by PW-13 PSI Zala who is a police officer itself creates a strong doubt and accordingly can not be accepted because the Investigating Officer is obviously and always interested in success of the investigation. Not only this, but further according to Mr.Vora, PW-13, PSI Zala had indeed no business to straightway record the dying declaration as it ought to have been recorded by the Executive Magistrate; (2) there is also a material discrepancy regarding the time when it came to be recorded, whether it came to be recorded at 12-35 or at some other time; (3) the entire procedure of recording FIR (EX-30) and then dying declaration (EX-31) obviously would have consumed about half an our. While reading the time of the dying declaration as 12-35, it appears to have been taken within few minutes only, which is simply incredible; (4) PW-13 PSI Zala, while blowing hot in one breath in the examination-in-chief said that it was written by him, and while blowing cold in the cross-examination in second breath he said that it was written by his writer-Police Constable, who is not examined.On the basis of this inconsistent evidence Mr. Vora raised the question whether such an evidence PW-13 PSI Zala can ever be accepted ?

9. The arguments of Mr.Vora attacking the dying declaration EX-31, though appear to be little attractive, but when it is tested on an anvil of the common sense,and overall background of the case, it loses all its cosmetic beauty and the true face of reality comes out. Nodoubt, the Investigating Officer is ordinarily interested in the success of the investigation, but that does not necessarily and always mean that in each and every cases, he goes out of the way and at any cost, registers a false case and that too under section 302 of the IPC to secure false conviction of an innocent person !. Further, there is indeed nothing wrong if as long as the Investigating Officer carries on his duty and efforts directed to the success of his ultimate investigation objectively and on the right path unless for the alleged success he resorts to some unfair questionable investigation . Now, in the instant case, whether the Investigating Officer was falsely actuated, motivated and interested in success of the investigation at any cost or or whether he has acted in ordinary normal way, these questions can be easily tested on the very many grounds . The first and foremost ground is the time factor. The incident in question took place at about 12-00 Noon, wherein Mongiben and her son-Harji received injuries and were taken to the Primary Health Centre at Rapar, where she immediately gave out

the name of the accused as an assailant ,weapon used, injuries caused which ultimately came to be corroborated by the medical evidence brought on the record. Under the circumstances, where indeed was the scope and the reason for Mongibai to give false name of the accused or for the PSI to concoct a case and record the false information implicating someone innocent in serious case of murder under section 302 of IPC !! This immediate conduct of Mongibai in giving out and taking down the name of the accused by PW 13 PSI Zala and other attending circumstances lends intrinsic corroborative assurance to our judicial conscience that PW-13 PSI might be interested in the success of the investigation, but then it can not be said that for that purpose he has resorted to any illegal, unfair and extra judicial method. In the instant case in view of the innjured herself giving out the name of the accused within half an hour and the PW-13 PSI immediately noting down the same, and found corroborated by medical evidence on the record, it is not possible to say that because PW-13 PSI Zala was interested in the success of investigation, he concocted false case. Accordingly, we are not prepared to reject the evidence of PW-13 PSI Zala stamping him out with general lebel that he being the Investigating Officer, interesdted in success of the investigation, his evidence therefore be treated as 'untouchable' keeping out of the consideration. No doubt it is true that three eye witnesses have not supported the prosecution, but it is not disputed that their statements were recorded without any unreasonable delay, and they were having their shops nearby scene of the offence. In this view of the matter, they might have seen the incident, but for whatever extraneous reasons, they have chosen not to support the prosecution. In any case, even if we do not rely upon the evidence of eye-witnesses but on that count, dying declaration can not be thrown to the winds which came to be recorded at the earliest.

10. Then the second question namely whether since the dying declaration is not recorded by the Executive Magistrate it becomes little doubtful ? Blind assertion by Mr.Vora on this point is little presumptuous. Here, there is the definite evidence of the PW-13 PSI Zala that he did make honest efforts to requisition the services of the Executive Magistrate for the purpose of recording the dying declaration, but since he was not available, he has ultimately done the needful by recording the dying declaration (EX-31) in question and answer form. In our opinion, PW-13 PSI Zala appears to be quite conscientious police officer, who having realized the emergency that if the injured was to be taken to Bhuj hospital, and if he

waits indefinitely for the Executive Magistrate to come, for recording the dying declaration, then perhaps the patient may succumb to the injuries, leaving the prosecution in learch-that is to say that though the opportunity was available with the Investigating Officer to record the dying declaration and yet he did not.In fact, foot-note at dying declaration (EX-31) shows that the same was recorded in the presence of the Medical Officer who is supposed to be an independent witness. Under the circumstances, to mechanically allege the police as interested in success of investigation and therefore keep aside his entire evidence out of the consideration would not be a judicial approach. What at the most the court is required to do while appreciating the evidence of police officer is to closely scrutinize the same and not further than that to mechanically stamp him out as interested, therefore, not dependable .Therefore this circumstance can not be magnified as has been done by the trial court to discard the evidence regarding the dying declaration (EX-31).

11. As regard the discrepancy regarding the time in recording the FIR (EX-30) and dying declaration (EX-31), it may be stated that it is too imaginary. Even in a given case, some bonafide mistake can be committed by any human being, and the Investigating Officer certainly does not cease to the human being, and accordingly if he commits any such mistake on such count, taking into consideration other overall evidence, it should be viewed leniently, if it does not result into serious miscarriage of justice.

12. Then comes the question of scribe not examined and PW-13 blowing hot and cold and taking the convenient stand when confronted in cross-examination. It is true that the Head-constable who wrote the dying declaration is not examined. It is also true that PW-13- PSI Zala for whatever reason has shown the tendency of weather-cock in the examination-in-chief saying quite something and in the cross-examination saying something different. May be, we do not know whether it was an honest mistake. Be the case as it may, but the fact remains that the dying declaration EX-31 contains the signature of PW-12 MO Dr.Makwana, who also has admitted that it was signed by him stating therein that patient was conscious. It also contains the signature of PW-13, PSI Zala. It is not disputed that this dying declaration was recorded atleast in presence of PW-13 PSI Zala. When the presence of the person who has recorded the dying declaration is not disputed, when the said dying

declaration is found to be duly signed by himself and the Medical Officer showing that the patient was conscious and in the fit state of mind, merely because the scribe is not examined, that factor standing by itself can not be permitted to create any doubt in our mind. Mr. Vora, in support of his submission has relied upon para-14 of the decision of the Supreme Court rendered in the case of GOVIND NARAIN & ORS VS STATE OF RAJASTHAN, reported in AIR 1993, SC, 2457. We have carefully gone through the entire judgment. It is clearly distinguishable as discussed above and therefore the said judgment is of no assistance to Mr.Vora. Apart this, when in any case,the court is called upon to appreciate the dying declaration, it must constantly bear in mind two things. In the first instance, what could be the reasonable test on the basis of which its credibility can be safely accepted beyond doubt ? and in the second instance, what is the duty of the trial Judge to see that the cause of justice is not lost because sometimes some advertant or inadvedrtant mistake on the part of the concerned Investigating Officer or learned PP in charge of the case, in duly establishing the contents of the deying declaration. To mention few of them -they are (1) when the incident in question took place ? (2) whether the injured was in a position to identify the accused ? (3) whether at the time of giving statement injured was conscious and in a fit state of mind to understand the questions put to him/her and then answer them ? (4) whether the injured was capable of understanding the questions and replies given to the same ? (5) when it was recorded ? (as the earlier recording of such dying declaration after the incident always lends an additional assurance to the judicial conscience) (6) whether it was duly signed by the Doctor giving a certificate that the patient was in a fit state of mind ? (7) Whether the said statement, at the end, bears the signature or thumb mark of the deceased person ? (8) whether the signature of the injured/deceased duly identified before the court ? (9) Whether the concerned Doctor was examined before the Court ? (If not, then in the first instance, it is the duty of the learned PP to examine him before the court, failing which it is also the duty of the trial court to issue summons and examine him. The reason is on the ground of the remisness on the part of the Investing Officer either in not naming the Doctor as a witness in the chargesheet and/or thereafter even if named and yet not examining him, accused can not be allowed to be benefitted thereby and in the second instance also the duty of the learned PP and that of the learned trial Judge does not come to an end, if the Investigating Officer has committed any mistake in not naming the

accused in the chargesheet. In number of cases, whether advertently or inadvertenly, the Medical Officer who was present at the time of recording the dying declaration and who has signed to the effect that the injured was conscious and in a fit state of mind to give his statement, he is not shown as a witness either in the chargesheet and if shown, not examined before the court, and all concerned namely Investigating Officer, PP and the trial court as if they have no further duty towards justice, just do nothing to examine him before the court, and accused getting unjust acquittal. These are the factors and cautions on the basis of which the courts ordinarily test the credibility of the dying declaration, and discharge their duty by examining the concerned officer. To this, we may add one more test-criteria viz. (10) that if the dying declaration is shortest possible one and recorded in question and answer form, then the very brevity and clarity of such dying declarations supply further assurance to the judicial conscience as the one quite dependable one, unless of course, something damaging to the same is pointed out on behalf of the accused. In the instant case, testing the dying declaration (EX-31) on the touch-stone of the aforesaid criterias, we are quite satisfied that the same was voluntary, truthful and genuine, made at the earliest possible opportunity in the question and answer form, identifying the accused, attributing the weapons, injuries caused ultimately corroborated by the medical evidence on the record and thereafter further supported by immediate oral dying declaration before PW-8 Kheta, giving out the name of accused. What more do we want to depend upon the dying declaration EX-31 ?. In overall view of the matter, the infirmities which Mr.Vora has tried to magnify regarding the time is not that serious which cuts at the roots of the credibility of PW-13 PSI Zala, the Medical Officer who admittedly signed the dying declaration EX-31 and that of PW-8 Kheta-the husband of the deceased. Mr.Vora further submitted that in dying declaration EX-31, Mongibai has given the name of her husband as Manji, which infact is not correct as the name of her husband is Kesha, and she has also given the name of village Dedarva-instead of village Chitrod. Now this appears to be some honest mistake. It is not difficult to appreciate the varying degree of pain which she must be having because of the sward wounds on her person, and the mental state where her son was assaulted with the sword. Infact, it is ultimately found that she was resident of village-Dedarva. PW-13, PSI Zala has made an application to correct the name of her husband and of the village where she resides by adding 'Kesha' in place of 'Manji' and adding 'Chitrod' in place of 'Dedarva.' As

against this infirmity, Mr. Vora forgets that so far as the name of the accused himself is concerned, the weapon attributed to him, seat of the injury caused, Mongibai and her son etc., there are no mistakes ! This lends quite an intrinsic corroboration to her genuine, voluntary and truthful nature of the dying declaration. In that overall view of the matter, we feel no hesitation in placing reliance upon the dying declaration Ex.31 and accordingly we accept the same as dependable beyond any manner of doubt.

13. Further, assuming for the sake of argument that Mr.Vora is right and therefore the dying declaration Ex.31 requires to be thrown to the dust-bin, then even, on what basis are we to discard FIR EX.30 and the evidence of PW-8 Kesha Kheta-husband of the deceased Mongibai ? Obviously NO. Moment PW-8 Kesha Kheta boarded in vehicle in which Mongibai was taken to the Hospital at Bhuj for further treatment, like any other husband, he inquired from his wife-Mongibai - how you came to be injured ? and atones, Mongibai disclosed the name of Babu. This natural conduct of inquiry by the husband and getting the name of the accused and that too on the very day of the incident immediately is a further clinching circumstance that the name of the accused was given out at the earliest and it was not as a result of any false concoction. Infact. where was the time for PW-13 PSI Zala to concoct the prosecution case to falsely name accused, firstly, in FIR (EX-30) and thereafter while recording dying declaration (EX-31); because at that point of time except two injured viz Mongibai and her son, there were none to influence him and frame up false case against the accused !!.

14. Now so far as PW-8 Kesha Kheta - the husband of the deceased Mongibai is concerned, the learned trial Judge has maintained complete black-out as he has not given any reason to discard his evidence. Except the bald assertion that the evidence of PW-8 can not be accepted and relied upon, there is nothing. A witness can be disbelieved provided in his cross-examination some potential infirmities brought out showing that his evidence was (i) either suffering from some manifest inconsistency and/or (ii) material contradiction and/or (iii) inherent improbability and/or material improvement and/or (iv) some enmity (v) and/or some interest going to the extent of falsely implicating the accused. Infact, the evidence of the witnesses who are interested because of relation with the injured and deceased, or any enmity,

their evidence also can be accepted and relied upon after the close scrutiny. In the instant case, no doubt, the motive was regarding betrothal of family members between the parties, but at the same time, deceased Monbgiben immediately named out accused as a assailant to PW-8 Kheta lends assurance to us regarding the truth of the prosecution case. This clearly goes to show that the accused had indeed some motive or some heart-burn against the family of the deceased, which ultimately led to the present incident where two murders took place.

15. We have carefully scanned the reasoning given by the learned trial Judge while acquitting the accused which are duly high-lighted by Mr.Vora while arguing before us. With respect, it must be stated that the the said reasonings are palpably wrong because we find that the dying declaration has been discarded on stray fleeting cloud of suspicion, which if we often see in the sky, and yet quite able to see the face of sun, moon the stars!!. In the instant case, those clouds of suspicion raised by Mr.Vora are not sufficient to blinden the judicial vision to see the true-face of the case. Secondly, the manner in which without assigning any reason the evidence of PW-8 came to be discarded, is ex-facie palpably wrong and manifestly perverse. These two factors clearly demonstrate that the impugned order of acquittal is not sustainable the least . It was argued that when two views are possible, then even if sitting as a trial court, we would have taken a different view viz. of conviction, that by itself is not sufficient to reverse and set aside the impugned order of acquittal. We do more than agree with Mr.Vora that when two parallel views based on sound reasoning and logic are available, the acquittal order should not be interfered with. But as against that when the view taken by the trial court is found to be lacking in overall experience, logic and reasoning, then the same can not be said to be other reasonable view possible, such a view is not possible. When it is said by the Supreme Court that two views are possible,both views must be reasonable judicial views and not on the one hand the judicial and on the other hand arbitrary. Instant is the case, where more or less the view taken by the trial court is little perfunctory and arbitrary, void of pragmatism, lacking the experience of life, and not judicial. In this view of the matter, there is no alternative left with this court, but to upset the impugned order of acquittal. In this view of the matter, we feel that the impugned judgment and order of acquittal being palpably wrong, manifestly erroneous and the same having become demonstrably unsustainable, deserves to be quashed and

set aside.

16. In the result, this appeal is allowed. The impugned judgment and order of acquittal is hereby quashed and set aside. The respondent is ordered to be convicted and sentenced for the alleged offence punishable under section 302 of IPC and is sentenced to suffer RI for life.

17. At this stage, Mr.Vora, the learned advocate for the respondent has prayed for time to surrender as the accused has to make necessary arrangement for his family members before going to the jail, and also for raising of the funds for going to the Supreme Court. Though Mr.Vora has prayed for ten weeks. We grant six weeks time to surrender from today.

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joshi/Pt*